AMENABILITY OF MILITARY PERSONS TO THE LAWS OF THE LAND.

1. To United States Courts.
2. To State Courts.
3. To Military Courts.

General Principles of Amenability.—Courts and text writers not unfrequently enunciate as a general principle that military authority is subordinate to civil law. Accepted literally, the broad statement can be sustained by neither law nor precedent.

The federal constitution provides for three kinds of military jurisdiction: (a) That known as *Military Law,* designed to be exercised both in time of peace and war and acquiring its authenticity from the acts of Congress prescribing army regulations and the rules and articles of war, as well as from the established customs and usages which are inseparable from the military state. This branch of military jurisdiction, having application to military persons only, may very properly be said to be subordinate to civil law; for it neither supersedes nor is it in derogation of the civil law but is in harmony with it.

(b) *Military Government,* which may exist in time of foreign war, without the boundaries of the United States, or during rebellion and civil war, within districts occupied by persons hostile to the government and known as belligerents. It supersedes, to a degree which may be deemed necessary, the local laws, has application to all persons within its jurisdiction and is enforced by a military commander under direction of the President with the express or implied sanction of Congress.

The third branch may be distinguished as (c) *Martial Law,* proper. Arbitrary in nature, unmerciful in execution and of almost unlimited power, it is called into action only when less harsh measures are no longer adequate to secure public safety and private rights. In the words of Lord Wellington, it is "the will of the commanding officer, expressed in time of war, within the jurisdiction of his geographical military department," and is subject to limitation and enlargement, only by the orders of his supreme executive chief. Under our constitution, it can exist only when Congress so provides or temporarily, by order of the President when the action of Congress cannot be invoked and the emergency is one of imminent and justifying peril. Martial law is the creature of dire necessity, and so far from being subordinate to or compatible with the civil law, it is for the time being the *one* authority, binding indiscriminately upon all persons within the jurisdiction in which it has

been established.[1] These distinctions must ever be borne in mind or confusion will follow any reflection upon the subject.

It is to be understood that the military state as such, is fully governed by its own code and that the army in time and on the theatre of war, is not liable to be controlled by other than military orders. However, the officers and soldiers of the army and of the organized militia when in the service of the United States do not become relieved of their civil obligation, but remain liable equally with other citizens and civilian inhabitants, to the jurisdiction of the civil courts for offenses against the local laws as well as for wrongs done or responsibility incurred toward individuals.[2] And conversely it may be said that the soldier is equally entitled, in a proper case, to the benefit of the civil law.

Military Persons.—For the purposes of this paper, the term "military persons" shall be deemed to include all commissioned officers and enlisted men of the regular and volunteer armies of the United States, the members of the organized National Guard of the several states and territories when in the service of the United States, and those civilian employees of the army who are considered for the purposes of military government to be in the military service.

The President, although commander-in-chief, does not belong to the army and is not a military person;[3] nor are the Secretary of War and the civilian members of his department.[4] Paymasters, quartermasters and commissary clerks, the clerks of department, division, and regimental headquarters and other civilians actually serving with troops in the field, are to be considered in the military service and amenable to military law.[5] The officers and cadets of the United States Military Academy are military persons.[6] The retired officers of the regular army are liable to be tried by court martial;[7] but enlisted men who have been retired on three-fourths pay on account of thirty years' service in the ranks of the army or marine corps are not military persons.[8]

Laws of the Land.—The term "laws of the land" has been defined to mean "general public laws, binding on all members of the community under similar circumstances" in contradistinction to "partial

[1] Berkheimer on Military and Martial Law, 1; De Hart on Military Law, 1; McArthur on Courts-martial, 34; Story Const., § 1542.

[2] State *v.* Sparks, 27 Tex. 632.

[3] Winthrop's Military Law, 113, Note.

[4] U. S. *v.* Burns, 12 Wall. U. S. 246.

[5] Winthrop's Military Law, 1307, 14 Op. Atty. Gen. 247, 11 Op. Atty. Gen. 297.

[6] Rev. Stat. U. S., 2nd Ed., § 1094; U. S. *v.* Watson, 130 U. S. 80; U. S. *v.* Morton, 112 U. S. 1, 16 Op. Atty. Gen. 611.

[7] Hill *v.* Territory, 2 Wash. Ter. 147.

[8] 26 Stat. L., § 504.

and private laws affecting the rights of individuals."[9] The term as here employed must obviously include not only such acts of the law-making power as federal and state statutes and the common law as recognized by the states and territories, but also authorized municipal ordinances and by-laws.[10] The military law does not "abrogate nor derogate" from the general law of the land,[11] but is a part of and in harmony with it.[12]

The Tribunals.—I. The United States Courts. The Federal Judicial system comprises:[13]

(a) The Supreme Court of the United States.
(b) Nine Circuit Courts of Appeal.
(c) Nine Circuit Courts.
(d) Sixty-six District Courts.
(e) The Court of Claims.

In addition, Congress has authorized and established the following local and special tribunals which are not, strictly speaking, a part of the federal judicial system:

(a) The Territorial Courts.
(b) The Courts of the District of Columbia.
(c) Consular Courts.
(d) Courts-Martial.

II. State Courts.—The judicial power of each state is vested in a system of courts comprising generally, three classes:[14]

(a) A court of last resort, possessing supreme appellate jurisdiction, usually called the Supreme Court.

(b) A number of courts of equal and co-ordinate authority, each within its own territorial limits, possessing general jurisdiction, civil and criminal, variously called "Superior Courts," "District Courts," "Circuit Courts," and "Courts of Common Pleas."

(c) Inferior Courts, presided over by justices of the peace or police magistrates, possessing jurisdiction of minor civil causes and petty criminal offenses. To this class properly belong the municipal courts of our larger cities.

III. Military Courts.—Military courts do not belong to the judicial branch of the government, but to the executive department. They are simply instrumentalities of the executive power, provided by Congress, to aid the President as commander-in-chief to properly

[9] Van Zant *v.* Waddell, 2 Yerger 260.

[10] Opins. Atty. Gen. Olney, 21st Op. 88, St. Johnsbury *v.* Thompson, 59 Vt. 300; contra, ex parte Bright, 1 Utah 145.

[11] U. S. *v.* Cashiel, 1 Hughes 556.

[12] 1 Bishop C. L. 846.

[13] Black's Constitutional Law, page 122.

[14] Black's Constitutional Law, page 280.

command the army and navy and enforce discipline therein, and are utilized under his orders or those of his authorized military representatives. Being courts of special and limited jurisdiction, it is necessary in order to justify their sentences, to affirmatively set forth facts sufficient to show that the court was legally constituted and that it had jurisdiction of the person and of the offense.

The most important of the military courts is:

1. THE COURT-MARTIAL.—The first court of this kind was known and established by the permanent laws of England as the "Court of Chivalry."[15] Defective in organization, lacking in jurisdiction, and feeble in power, it was nevertheless a potent factor in the development of discipline and organization in the military, in the days of pure chivalry. And to these imperfect tribunals, which were nothing more than courts of honor, the present military judicial system owes its framework. Courts-martial today exist by the same authority as civil courts of the United States, have the same plenary jurisdiction in offenses, by the law military, as the latter courts have, in controversies within their cognizance, and in their special and more limited spheres, are entitled to as untrammeled an exercise of their power.[16]

TWO KINDS OF COURTS-MARTIAL.

I. FEDERAL COURTS-MARTIAL.—Under this branch the acts of Congress have authorized five classifications:

(a) The General Court-martial.
(b) The Garrison Court-martial.
(c) The Regimental Court-martial.
(d) The Field Officers Court.
(e) A Summary Court.

By far the most important of these is the general court-martial and this discussion will, in the main, be devoted to it. The Articles of War prescribe with some detail, its organization, character and authority. The court may consist of any number of officers, from five to thirteen, and as commander-in-chief under the Constitution, the President has general discretionary power to appoint its members and order it to convene,[17] and by virtue of the 72nd Article of War the same power, when necessary, is reposed in a general officer commanding an army, a territorial division or a department, or a colonel commanding a separate division. The 73rd Article of War, which applies only in time of war, confers the power to order general

[15] Blackstone's Comm., 68, 103.

[16] In re Davidson, 21 Fed. 618; In re White, 17 Fed. 723; In re Bogart, 2 Sawy. 396; Hamilton *v.* McClaughry, 136 Fed. 445.

[17] Swaim *v.* U. S., 165 U. S. 553; Runkle *v.* U. S., 122 U. S. 543.

courts-martial upon division and brigade commanders. It seems, however, that the commander must not rank below the grade of a field officer.[18] The Superintendent of the Military Academy is empowered by the Revised Statutes United States (§ 1326) to convene a general court-martial for the trial of cadets.

The Bureau of Military Justice was consolidated by the Act of July 5, 1884, under the title of Judge-Advocate General's Department. The judge-advocate in his relation to military courts-martial, is usually an officer detailed by the authority appointing the court, to prosecute cases before it and to act as its legal adviser. It is his duty to see that the court conforms to the law and to military custom and to secure to the accused his rights before the court. While the person being tried may, in his judgment, be represented by separate counsel, nevertheless it is intended that the judge-advocate shall secure for him a fair and impartial trial regardless of whether or not he be so represented. Moreover, it may be said to the honor of the military service that so rarely do judge-advocates forget their duty to the accused that it has been seldom indeed when the sentence of a court-martial has been unwarranted.

Jurisdiction of Courts-martial.—The jurisdiction of military courts in general is to be derived from the various statutes and articles of war and from the army regulations.[19] There can be no such thing as jurisdiction residing in a military court by implication. The consent and voluntary appearance of the accused cannot confer jurisdiction upon a court-martial which is in fact without it.[20]

(a) *As to Place.*—The law imposes no territorial limitation upon the jurisdiction of courts-martial, but such jurisdiction extends over the whole territory of the United States,[21] and this is believed to embrace our island possessions. Where a United States army is within the territory of another government, whether in peace or war, its military courts may exercise jurisdiction over all persons and offenses legally subject thereto.[22]

(b) *As to Persons.*—Jurisdiction of courts-martial extends to all

[18] While in command of the Union troops in St. Louis at the outbreak of the Civil War, Captain Lyon made a futile attempt to convene a general Court-martial. Atty. Gen. Bates, however, denied that the power resided in an officer beneath the rank of major, regardless of his command. The subsequent promotion of Capt. Lyon to the grade of Brigadier General of Volunteers ended the controversy, and I am unable to find that the courts have ever decided the point.

[19] In re Crain, 84 Fed. 788.

[20] Vanderheyden *v.* Smith, 1 Johns. N. Y. 150; Duffield *v.* Smith, 3 S. & R. Pennsyl. 590, 22 Op. Atty. Gen. 137.

[21] Winthrop's Military Law, 2nd Ed. 104.

[22] Coleman *v.* Tennessee, 97 U. S. 509; Atty. Gen. Knox in the June number (1903) of the *Infantry Association Journal.*

persons in the military and naval service of the United States.[23] This applies equally to the regular and voluntary armies and to the National Guard when in the service of the federal government. However, volunteers and members of the militia may be tried only by courts-martial composed of volunteer and militia officers, respectively.[24]

(c) *As to Offenses.*—Courts-martial have jurisdiction over all offenses made cognizable by such courts, under the Articles of War or under the numerous statutory provisions in the nature of Articles of War. These offenses comprise in general purely military offenses and such as are violations of the general laws of the land.[25] The common law distinctions between felonies and misdemeanors do not obtain at military law; nor do courts-martial discriminate between principals and accessories in guilt;[26] all are regarded as principals.

The jurisdiction of courts-martial is exclusive over persons charged with the crime of desertion, in cases of disobedience of orders, mutiny and sedition, spying and such other offenses as are in violation of the Articles of War and for which a punishment has been prescribed. When the sentence and judgment of a general court-martial, in the trial of persons charged with the above offenses, has been confirmed by the President or his authorized representatives, such sentence and judgment are final and conclusive and cannot be reviewed or interfered with by the civil courts,[27] provided, however, that the jurisdiction of the tribunal may always be inquired into and if found wanting, the prisoner may be discharged on habeas corpus;[28] but the inquiry must be directed solely to the jurisdiction, for mere irregularity or error in the procedure or even excessive and unwarranted sentence do not render the judgment liable to collateral attack in the civil courts.[29] The entire proceeding must have been void, *ab initio,* for want of jurisdiction before the civil courts may take cognizance of the cause, and the only appeal which lies from the lawful sentence of a court-martial, is a direct appeal to the President of the United States; for such sentence once confirmed by the proper authority, is final and must be executed unless the President pardon the prisoner.

(d) *As to Time.*—The 103rd Article of War provides that no person shall be liable to be tried and punished by a general court-

[23] *Ex parte* Milligan, 4 Wall. U. S. 2; Johnson *v.* Sayre, 158 U. S. 109; 15 Op. Atty. Gen. 597; 18 Op. Atty. Gen. 176.

[24] Revised Statutes United States, § 1658.

[25] Dynes *v.* Hoover, 2 Howard U. S. 65.

[26] Winthrop's Military Law, 2nd Ed. 148.

[27] Curtis *v.* Roberts, 177 U. S. 496; Swaim *v.* U. S., 165 U. S. 553.

[28] *Ex parte* Milligan, 4 Wall. U. S. 2; in re Grimley, 137 U. S. 147.

[29] Matter of Corbett, 9 Ben. U. S. 274.

martial for any offense which appears to have been committed more than two years before the issuance of the order for trial, unless by reason of absence from the jurisdiction of the military courts (construed in *In re Davidson,* 4 Fed. 507, to mean absence from the United States) or of some other manifest impediment, he shall not have been amenable to justice during that period.

Inferior Courts-martial.—Of the regimental and garrison courts-martial and the field officers' court but little need be said. Except as to jurisdiction, the Statutes and Articles of War applicable to general courts-martial are alike applicable to the inferior military courts. Their powers and organization are defined in the 80th, 81st, 82nd and 83rd Articles of War. The Act of Congress of October 1, 1890, provided for the Summary Court; although the statute does not expressly repeal the Articles of War, authorizing the regimental and garrison courts-martial, the Summary Court of recent years, has largely displaced them in the service and is the most important of the inferior courts.

II. STATE COURTS-MARTIAL.—Besides the courts-martial organized under federal authority, each of the states and territories has provided by statute for courts-martial, courts of inquiry, and military commissions for the trial of members of the organized National Guard. These courts in respect to their constitution, powers and procedures are similar to those of the regular and volunteer armies, in their more limited spheres.

2. COURTS OF INQUIRY.—The Articles of War provide for the court of inquiry, the purpose of which is to examine into the particulars of an accusation or imputation against an officer or soldier. The proceedings in this court are more in the nature of an investigation than a trial, and are preliminary to determining whether the circumstances warrant the trial of the accused by court-martial.[30]

The court of inquiry serves as a safeguard to the alleged military offender in this—it often spares him the humiliation of trial by court-martial in those cases where his detention is without probable cause. It is not unlike the civil grand jury which determines from the facts in a particular case, whether or not, the accused should be indicted for the offense charged. This court may also take cognizance of any matter which appears to be prejudicial to the discipline and government of the army. The two years limitation of prosecutions prescribed in the 103rd Article of War, is not applicable to it.[31]

3. MILITARY COMMISSIONS.—"A military commission is a tri-

[30] 115th to 121st Arts. of War.
[31] 6 Op. Atty. Gen. 239.

bunal instituted in time of war or martial law for the trial of offenses which either by reason of the character of the accused (i. e., where he is not amenable to court-martial) or the nature of the offense, do not come within the rules and Articles of War."[32] They derived their origin from the Mexican War, where they were initiated by General Scott. During the Civil War, military commissions were extensively employed to administer justice in the captured cities occupied by Union troops, and later tried and punished many conspirators against the government in the border states. After the capture of Manila and Santiago de Cuba, until the final evacuation of the latter and the establishment of civil tribunals in the Philippines, United States military commissions sat continuously in those cities. Although military commissions have been awarded executive, statutory and judicial recognition, they are in no sense of the term, "courts."[33] Their jurisdiction, unlike that of courts-martial, can exist only under martial law or military government when the civil authority is suspended and they must be confined to the theatre of war or of military occupation.[34] Such jurisdiction extends indiscriminately to all persons, military or civil, within the district under martial law or military government.[35]

The offenses cognizable by such a tribunal comprise violations of the laws and customs of war, disobedience of military orders and regulations not within the jurisdiction of courts-martial and criminal offenses cognizable by the ordinary criminal courts, and which would be tried by such courts if unobstructed in the exercise of their powers. It is to be understood that the military commission is a criminal tribunal exclusively and cannot assume jurisdiction of controversies of a civil nature between individuals. Its jurisdiction once established, the proceedings of a military commission are not subject to be reviewed by writ of certiorari or on habeas corpus, in any of the civil courts, federal or state.

Military Courts in General.—The judicial systems created by the federal constitution and by the constitutions and statutes of the several states are entirely disconnected from and independent of the military courts which exist by virtue of the military law proper. Although the courts of the three systems exist side by side in the same territory, in time of peace, they are as independent as if they had been respectively established by foreign nations. Each is entitled to the uninterrupted exercise of its own powers and func-

[32] Weaver's Case, 13 Op. Atty. Gen. 59.

[33] *Ex parte* Vallandigham, 1 Wall. U. S. 243.

[34] Milligan *v.* Hovey, 3 Biss. U. S. 13; Devlin's case, 12 Ct. Cl. 266; 12 Op. Atty. Gen. 128.

[35] Winthrop's Military Law, 1307.

tions; neither civil nor military courts may rightfully encroach upon the province of the other; neither can define, limit or interfere with the jurisdiction constitutionally conferred upon the other.[36] The jurisdiction of a military court is in the main non-territorial. If it has jurisdiction of the person and of the offense, it is immaterial where the latter was committed.

Double Amenability.—That a military person may be amenable to both the military and civil courts for the same act, is no longer disputed. When the acts constituting a military offense involve also the laws of the United States or of a state, the officer or soldier is liable to be tried both by a court-martial for the offense against the Articles of War and by a civil tribunal for the civil crime. The offenses, however, are not the same but distinct.[37]

A military person may be liable to a civil suit on account of trespass, etc., for which he has been tried or may be triable by court-martial for a breach of military discipline. Thus an officer liable to trial for the illegal and unjustifiable punishment of a soldier or for the unauthorized seizure of the property of a private citizen may either before or after trial by court-martial be sued for the injury or loss resulting to the individual. Indeed it is possible to conceive of offenses in which there would be a triple amenability; for example, an officer or a soldier assaults a clerk on a United States mail train in a town adjacent to the reservation on which he is stationed. He is triable by the local civil authorities in a state court for assault and battery, in a United States Court for interfering with the United States mails, and by a military court, under the 62nd Article of War for conduct prejudicial to military discipline, or if an officer and the offense is serious, under the 61st Article of War, for conduct unbecoming an officer and gentleman.

Official and Discretionary Acts.—It is, however, a general principle that officers of the army equally with other public officials are not to be made criminally responsible for the consequences of the ordinary and regular discharge of their official duties.

---

[36] The authority for trying military persons for violation of the military laws and of the laws of the land is found, in time of war, in the 58th, and in times of both peace and war, in the 60th, 61st and 62nd Articles of War.

[37] The recent trial of J. M. Neall (118 Fed. 699, 56 C. C. A. 31), one time first lieutenant Fourth U. S. Cavalry, brought out an exhaustive discussion on the subject of double amenability. It was here held that the United States District Court had authority to indict and try a person charged with having forged an obligation of the United States, with intent to defraud, (which is made an offense against the government by Rev. Stat. Sec. 5414) although he was at the time an officer of the army and the alleged offense was committed at a military post over which the United States had exclusive jurisdiction; there being no provision either constitutional or statutory conferring exclusive jurisdiction on courts-martial to punish such offense. See also U. S. *v.* Cornell, 2 Mason, 61; U. S. *v.* Carr, 1 Woods, 480; U. S. *v.* Cashiel, 1 Hughes, 552.

Effect of Being on a Military Reservation Over Which the United States Exercises Exclusive Jurisdiction.—Where exclusive jurisdiction over a military reservation or post situated within a state, is vested in the United States, either by its having reserved the same upon admission of the state (or its equivalent, the consent of the state to the purchase of the land by the United States) the persons stationed or commorant upon the premises, become isolated both territorially and as respects their civil relations. In a political sense, the land is no longer a part of the soil of the state nor are the occupants inhabitants of the state. They are severed from the enjoyment of the rights and from subjection to the liabilities of the citizens of the state as entirely as if they were residents of a foreign country. They have no more right to vote in the state, to send their children to the public schools, to use the public libraries, to be protected by the police and fire departments, etc., than have the citizens of another state.

The opportunities of this class—use of the public schools or libraries for example—which may be extended to them, are extended as privileges, and not as rights. Conversely, they cannot legally be taxed by the state or municipality for their personal property held on the premises or be required to perform militia duty or to serve on juries or to furnish labor on roads in the state. Nor are they subject to the civil or criminal processes of the local courts, except in so far as the right to execute the same may legally have been reserved to the state; as where, as has been not unusual—in order that the reservation or post may not serve as an asylum for criminals, debtors, etc.,—the state has reserved the right to execute within the premises, process issued by its courts on account of criminal offenses committed or causes of action initiated without the same. In all other cases, military persons are subject to the jurisdiction and process only of the United States courts and authorities.[38] This is the status not only of the officers and soldiers stationed at the post but of the civilian employees and persons permitted to reside upon the reservation.[39]

Such a Status Non-existent in a Territory.—A territory, unlike a state, is not a sovereignty.[40] "It is not within the jurisdiction of any state," but is "within the power and jurisdiction of the United

[38] It is hardly necessary to remark that military persons, when not specifically excepted, are liable to any general tax imposed by Congress. See Circ. War Dept., Dec. 8, 1888.

[39] On the general subject of this exclusive jurisdiction—how it is acquired and what is its effect—see the following: U. S. *v.* Cornell, 2 Mason, 60; U. S. *v.* Tierney, 1 Bond, 571; U. S. *v.* Davis, 5 Mason, 356, and an excellent treatise entitled "Military Reservations," by James B. McCrellis.

[40] Talbott *v.* Silver Bow County, 139 U. S. 446.

States."[41] "All territory within the jurisdiction of the United States not included in any State, must necessarily be governed by or under the authority of Congress."[42] Congress being supreme over the territories, may legislate directly for a territory, but as a general rule after organizing a territory it leaves the detail of the local legislation to the territorial legislature. After establishing the territorial courts in the organic act, it usually delegates to the local legislature, the privilege of defining their jurisdiction.

Thus the authority of all the civil officials of a territory emanates either mediately or immediately from Congress; and as a general rule, in the absence of any provision in the organic act or other federal statutes exempting officers and soldiers of the army from the jurisdiction and authority of the local courts and officials, they will be amenable thereto in the same manner and to the same extent as are the civilian inhabitants,[43] where such amenability may not interfere with the due performance of their military duties. The fact that they may be stationed and abiding at a post on a military reservation will not, as it would were such post within a state, affect the question of their local amenability.[44] In a constitutional sense there can be no such thing as "exclusive jurisdiction" in a territory. And unless exempted as above, such officers and soldiers will be subject to taxation by the territorial authorities, for their property except such as is instrumental for or incidental to the performance of their military duties. As it is observed by Mr. JUSTICE BREWER in *Talbott* v. *Silver Bow County*,[45] "under the general territorial system, as expressed by the various organic acts, the power of taxation is absolute, save as restricted by the Constitution or congressional enactments." But Congress it may be supposed, will not ratify any legislation which would subject the personnel of the army to oppressive taxation.

FORMS OF CIVIL AMENABILITY.

I. Amenability to the United States.

(a) *Criminal Liability.*—This is incurred where the party becomes chargeable (1) either with the commission of a crime of one of the classes known as crimes against the operations of the government, crimes against justice, acts constituting official misconduct, etc., (such as perjury, extortion, accepting bribes and counterfeiting) and made punishable under Title LXX of the Rev. Stat., or other-

[41] Mormon Church *v.* U. S., 136 U. S. 43.
[42] National Bank *v.* County of Yankton, 101 U. S. 133.
[43] See G. O. 30, War Dept. 1878; Contra Circ. 21, Dept. of the Columbia, 1885.
[44] Benner *v.* Porter, 9 Howard U. S. 242.
[45] 139 U. S. 438

wise; (2) or with the commission of one of the more familiar crimes, such as murder, manslaughter, arson, larceny, etc., similarly made punishable when committed in a place over which the United States exercises exclusive jurisdiction;[46] (3) or with the commission of treason.

(b) *Civil Liability.*—It is a general rule of law that all public officers are liable to the United States for any pecuniary loss to the government which may be incurred in the course of the discharge of their official duties.[47] This principle has special application in practice to cases of disbursing officers who have become chargeable with deficits of public money or failure to account for public property entrusted to them for a public purpose. Such officials are almost invariably under bond and they may in general be sued either with their bondsmen or separately. The laws enacted for the safe-keeping and proper disposition of the public moneys[48] are particularly strict and specific, making officers personally liable for moneys lost while in their charge, and constituting their acts legal embezzlement, when perhaps the loss may have resulted from no fault of their own, but from some cause which could not have been foreseen or guarded against—for example, the failure of a bank in which their funds had been deposited. It might be added in this connection, that by legislation in 1886, the Court of Claims was empowered by Congress to hear and determine claims of disbursing officers for "relief from responsibility on account of capture or otherwise" for public funds while in their charge, and under this provision that court has allowed claims of disbursing officers by releasing them from liability on account of funds taken from them by robbery or theft without fault or negligence on their part;[49] also in the case of money lost by the failure of a bank[50] and by fire.[51] In cases not within the scope of this provision, such officials will, as a rule, have no other recourse except to apply to Congress for a special act for their relief.

II. Amenability to Suits by Other Military Persons.

(a) *For Acts as Members of Courts-martial.*—A judicial officer cannot be made liable in an action for damages growing out of any judgment, however erroneous, that he may have rendered, provided

[46] U. S. *v.* Carr, 1 Woods, 484; U. S. *v.* Travers, 2 Wheeler (U. S. C. C.), 490; U. S. *v.* Cornell, 2 Mason, 91.

[47] Cooley Prin. of Const. Law, 123.

[48] See ch. six of Title LXX, Rev. Stat.

[49] Scott *v.* U. S., 18 Ct. Cl. 1; Broadhead *v.* U. S., 19th Id. 125.

[50] Hobbs *v.* U. S., 18 Ct. Cl. 189.

[51] Hovel *v.* U. S., 21 Ct. Cl. 300.

he had jurisdiction of the parties and subject matter,[52] and, while the members of a court-martial may be liable to an officer or soldier tried thereby, where the court was without jurisdiction or its proceedings or sentence were otherwise unauthorized and illegal,[53] for a mere error in their rulings or sentence, they are not subject to a civil action.[54] Where, however, the judgment of the court is clearly shown to have been actuated by malice,—personal hostility or injurious prejudice, for example—a member or members implicated may be held liable in damages though the court had jurisdiction of the case; but this would be a rare condition. Suits against members of courts-martial have been exceedingly infrequent in this country.[55]

(b) *For Executing an Illegal Sentence of Military Court.*—The courts have uniformly held that an officer who executes the sentence of a military tribunal which was without jurisdiction in the case, or whose proceedings or judgment were clearly illegal, so that the sentence was invalidated, is a trespasser and liable to an action for damages on the part of the person tried.[56] To render the officer liable it is not necessary that he should have acted with any personal animus toward the accused, but in the absence of such animus "vindictive" damages will not be awarded.[57]

(c) *For Injuries and Wrongs in General.*—Actions have not infrequently been instituted, more frequently in England than in this country, however, by officers and soldiers against superior officers for wrongs alleged to have been done them, the acts complained of usually being unauthorized arrest and confinement, malicious prosecution in a military court, preferring of false charges and libel in official report. In cases of unauthorized arrest and confinement, the civil courts have, as a rule, refused relief except where the act was absolutely illegal or where absence of probable cause and the presence of malice on the part of the defendant, in initiating the proceedings have been clearly established by the evidence.[58] Where the complainant has been unable to establish these elements the case has been regarded as one of purely military right or liability which could best be disposed of by court-martial and the civil action has not been sustained.[59] The act of preferring false and malicious

[52] Draecker *v.* Solomon, 21 Wis. 621; Milligan *v.* Hovey, 3 Biss. 13.

[53] Warden *v.* Bailey, 4 Taunt. 77.

[54] Vanderheyden *v.* Young, 12 Johns. (N. Y.) 150.

[55] Schumaker *v.* Nesbit, 2 Rawle, Pa. 201; Milligan *v.* Hovey, 3 Biss. 13.

In England, suits against members of courts-martial have been more frequent. See Fry *v.* Ogle, 1 McArthur, 299; Moore *v.* Bastard, 4 Taunt. 70.

[56] Dynes *v.* Hoover, 20 Howard, U. S. 65; Wise *v.* Withers, 3 Cranch, U. S. 331.

[57] Milligan *v.* Hovey, 3 Biss. 13.

[58] Sutton *v.* Johnstone, 1 Term Report, 493; Freer *v.* Marshall, 4 Fost. & Fin. 485.

[59] Dawkins *v.* Lord Rokeby, L. R. 8 Q. B. 255, 271.

charges has been held to constitute a valid cause of action.[60] The charges against an officer or soldier, made to a superior, not maliciously and carelessly, but in good faith and in the discharge of an official duty, are privileged communications for which the preferring officer cannot be held legally answerable if the charges themselves prove to be unfounded. It is not enough that they are not true; they must be wilfully untrue.[61]

(d) *Unjustifiable Violence or Illegal Punishment.*—An action will not lie against an officer for an exercise, upon a subordinate of discipline severe in itself, provided such disciplinary measure be sanctioned by military custom; otherwise where the severity is not thus sanctioned. Thus a naval commander was held not liable in an action for damages for ordering a midshipman to the masthead, this being a customary punishment for the infraction of certain rules.[62]

In a number of English cases, however, heavy damages have been awarded for excessive and illegal flogging inflicted upon inferiors by the command of superior officers.[63] In the United States service officers of the army have frequently been tried by courts-martial for inflicting cruel and unusual punishment or using unnecessary violence upon inferiors;[64] however, instances of civil suits, as well as criminal proceedings in the civil courts, based upon such causes of action, have been rare occurrences. In the leading case of *Dinsman* v. *Wilkes,*[65] in which an officer of the navy was sued by a marine upon whom he had inflicted a corporal punishment, it was held by CHIEF JUSTICE TANEY that where the officer acts within his discretionary power and without malice, he is not amenable to civil proceedings; but where an officer was alleged to have exceeded his disciplinary authority in assaulting and confining a subordinate at sea, an action in trespass was held to lie in a state court.[66] But as heretofore indicated, the civil courts are reluctant to entertain this class of claims, which, except in a clear case of legal liability, belong rather to the province of the military tribunals and authorities.

(e) *Causes of Action Resulting From Negligence.*—Where, in the performance of duty, an officer or soldier unintentionally but through negligence does any considerable injury to another officer

[60] Op. Law Officers, London, 1809, William Corbett *v.* Capt. Powell.
[61] Dixon *v.* The Earl of Wilton, 1st Fost. n., 419; Dickson *v.* Cumbermere, 3 Id. 527,
[62] Leonard *v.* Shields, 1 McArthur, 159.
[63] Warden *v.* Bailey, 4 Taunt. 70; Grant *v.* Shard, Id. 84.
[64] Winthrop's Military Law, 678.
[65] 7 Howard U. S. 89, s. c. 12 Id. 390.
[66] Wilson *v.* Mackenzie, 7 Hill, 95.

or soldier or to his property, the former is liable in an action for damages by the latter in the same manner as would be a civilian. Thus where a soldier on skirmish drill, so negligently discharged his rifle as to wound another soldier, he was adjudged liable in damages in a suit instituted on account of the injury.[67]

III. Amenability to Suits by Civilians.

(a) *Liability for Abuse or Exercise of Excessive Authority.*—It is a general principle that the government is not legally liable for unauthorized acts committed by its officers or soldiers against civilians even though occurring while they are engaged in the discharge of their official duties.[68] It is the officer or soldier therefore, who is personally liable where he exceeds or abuses his authority and as a consequence, an injury results to a civilian. An early and leading American case is that of *Smith* v. *Shaw,*[69] in which an army officer had caused to be arrested and held for trial by court-martial, a civilian who was not subject to military jurisdiction; damages were awarded against him for the tort. A more recent case of damages adjudged against an officer of our army who had acted in entire good faith, though illegally, is that of *Bates* v. *Clark,*[70] in which General Bates, then a captain of infantry, was held to be a trespasser for seizing liquor in a territory supposed by him to be in Indian country, but which was not so in fact.

(b) *Liability of Inferiors Where Acting Under Orders.*—Is an inferior officer or soldier justified in the execution of an order given him by a military superior? At military law, the question is free from difficulty. Obedience of orders is the law of armies. *An inferior is bound to obey the command of his superior officer in the line of his military duty.*[71] It is not for him to question its legality or demand indemnification for its execution but to obey at once and in toto. If he be brought to trial for an act resulting from such obedience to an order apparently legal but in fact illegal, he need but plead his obligation to obey and such defense will be a complete answer to the charge.[72] But let him be called upon to answer for his acts, in carrying out an order, before a civil court and his position becomes at once a dangerous one. Of course, where the author-

[67] Weaver *v.* Ward, Hobart, 134.

[68] U. S. *v.* Lee, 106 U. S. 196; Carpenter *v.* U. S., 45 Fed. 341.

[69] 12 Johns. (N. Y.) 257.

[70] 95 U. S. 204; Waters *v.* Campbell, 5 Sawy. 22.

[71] In justifying himself by the order of a superior, the subordinate need not show that the order was a written one; a verbal order if explicit will be of equal effect; Pollard *v.* Baldwin, 22 Iowa, 328.

[72] Digest 28—"The 21st Article of War."

ity of the superior is complete, it shields all who duly act under him.[73] The inferior in executing a valid authority or order is protected much as is a sheriff by his praecipe, and if he proceeds without malice and upon probable cause he will in general be justified though he commit error.[74] But where the order of the superior is illegal, ignorance of its illegality and good faith in its execution constitute in general no defense in a civil tribunal. It is true that in a few cases a view has been taken similar to that of the military courts; and the order of the superior, legal and valid apparently, has been held to protect the inferior because he was bound to obey it.[75] In some other civil cases the inferior has been considered to be justified on the questionable ground that he is, under the circumstances, acting under duress or a sort of quasi compulsion;[76] but in the vast majority of adjudications, it has been held that an order which is in fact illegal, regardless of how legal, proper and just it may appear on its face, can protect no one involved in its performance. That the superior who issues it and the subordinate who executes it as ordered, will both, or either, be liable in damages as for a trespass, to any person aggrieved.[77] That the illegal order may have been issued by the highest authority of the government—even directly from the President as commander-in-chief—cannot render it of any greater efficacy in protecting the subordinate who acts upon it, than if it proceeded from a subalteran.[78]

This doctrine as followed by the civil courts has, in very many instances, worked a great hardship upon military persons. The reasoning in support of it may apply very logically to civil officials who can require indemnity before executing a process, the legality of which is doubtful; there is no just or consistent reasoning in support of its application to the inferior officer or soldier of the army. An order, fair on its face, is placed in the hands of an officer; his oath and his duty as a soldier require its execution. If he refuse to obey it, he is liable, in time of war, to suffer death or such penalty as a court-martial may direct. If he execute the order as given and it proves to be illegal, the civil courts may place upon his shoulders the responsibility for resulting injuries; while the commanding officer upon whom in justice, recourse should be had, will not, in all probability, be called upon to answer for the consequences fol-

[73] Teagarden *v.* Graham, 31 Ind. 422.

[74] Wilkes *v.* Dinsman, 7 Howard U. S. 89; Despau *v.* Olney, 1 Curtis, 306.

[75] Riggs *v.* The State, 3 Cold. 85; see also Bates *v.* Clark, 95 U. S. 204.

[76] McCall *v.* McDowell, Deady, 233; U. S. *v.* Grinnier, 4 Phil. (Pa.) 396.

[77] State *v.* Sparks, 27 Tex. 632; Harmony *v.* Mitchell, 1 Blatchford, 356.

[78] U. S. *v.* Buchanan, 8 Howard (U. S.), 105; Little *v.* Barrene, 2 Cranch, U. S. 179; Trammell *v.* Bassett, 24 Ark. 499.

lowing the performance of his order. It is true that except under martial law and military government, our Constitution has made the civil authority paramount to the military. Moreover, the oath of the officer and the enlistment of the soldier, are voluntary acts by which they assume new duties and obligations in addition to their civil responsibilities. But one begs the question when he attempts by means of these facts to justify a policy which literally places a man between two fires. It is said that ours is not a military nation. It may be believed that it will not become a military nation while our courts compel a military subordinate to obey at his peril, the order of his commander. In the light of national experience, it would seem that this doctrine is incompatible with the fixed policy of the United States.

(c) *Liability for Manner of Executing an Order.*—An order may be legal but the manner in which it is executed, the reverse. Thus in the case of an arrest, only the proper degree of force should be employed, otherwise the officer or soldier executing it becomes civilly amenable.[79] So an unduly severe or inappropriate confinement may of itself or in connection with other circumstances, constitute a cause of action. Thus a civil prisoner is not in general to be subjected to the same restraint or exaction as a soldier;[80] nor a political prisoner to the same as a criminal.[81] Holding a prisoner confined for an unreasonable or illegal period, will render the responsible officer liable to suit.[82]

(d) *Liabilities in Time of War.*—For an act done juri belli or for the exercise of a belligerent right, an officer or soldier cannot be called to account in a civil proceeding.[83] It follows that an officer cannot be held liable in a suit for the destruction of private property of an individual citizen, in an adequate emergency of war, or in the course of the performance of a military duty during war.[84]

The existence of war, however, will not justify wanton trespasses upon the property of civilians or other injuries not sanctioned by the laws and usages of war;[85] nor will it justify wrongs done by irresponsible, unauthorized persons.[86] But in general, a greater discretion is conceded commanding officers and military persons executing orders in time of war;[87] obliged as they are to act

[79] McCall *v.* McDowell, Deady, 233.

[80] Waters *v.* Campbell, 5 Sawy. 17.

[81] McCall *v.* McDowell, Deady, 233.

[82] Waters *v.* Campbell, 5 Sawy. 17.

[83] Commonwealth *v.* Dolland, 1 Duvall, 182; Doyle *v.* Armstrong, 2 Id. 533.

[84] Holmes *v.* Sheridan, 1 Dillon, 357; Harmony *v.* Mitchell, 13 Howard, U. S. 115.

[85] Bowles *v.* Lewis, 48 Mo. 32; Hough *v.* Hoodless, 35 Ill. 166.

[86] Hogue *v.* Penn., 3 Bush, 663; Worthy *v.* Kinamon, 44 Ga. 297.

[87] U. S. *v.* Diekelman, 92 U. S. 527; Wall *v.* McManera, 1 Term Rep. 536; Sutton *v.* Johnston, 1 Id. 493.

promptly upon emergencies, they should not be held to the same strict accountability before the courts as for acts in disregard of private rights in time of peace.

(e) *For Killing, Etc., in Suppressing Riot.*—An officer who with his command, is called out under the laws of the United States to suppress a riot and restore order, is justified in using whatever force may be necessary even to the taking of human life. But if called to account before a civil court, he must be prepared to convince a jury that only such force was employed as was, at the time, apparently absolutely necessary to quell the disturbance, otherwise, he would be held accountable for his acts.[88] The sentiment in this country is constantly gaining strength that prompt and decided action on the part of military forces is the only rational and effectual course in dealing with riotous mobs and assemblages. Doubtless the courts, in most cases, will justify an officer or soldier in shooting down a rioter engaged in an aggravated breach of the peace and defiance of the laws, provided such shooting be without malice and while in the discharge of his duty. The difficulty usually arises when an innocent person is the victim, as not unusually happens, and the greatest care should be taken by military officers to prevent such catastrophies.

(f) *Liability on Public Contracts.*—An action will not lie against an army officer on a contract duly entered into by him on behalf of the United States, in his official and representative capacity.[89] He is not personally bound upon such a contract and recourse can be had thereon from the United States only; a suit in the Court of Claims being the usual proceeding. An officer becomes personally liable only where he has acted without authority or has exceeded his authority under or in regard to a public contract; his liability then becomes similar to that of other public officers for tortious acts.[90]

(g) *Liability of Officers on Garnishee Process.*—An officer of the army may not be sued as trustee or garnishee for or on account of public money in his official possession. Money in the hands of a disbursing officer for disbursement remains public money until actually paid over to the person or persons entitled to receive it. To allow it to be attached would be to divert the public funds of the United States from the specific purposes for which they had been appropriated by Acts of Congress, and while a violation of law, would tend to embarrass and to a certain extent, suspend the operations of the government.

---

[88] In re Moyer, Col. —, 1905; *ex parte* Moore, 64 N. C. 112; in re Boyle, 6 Idaho 609, 57 Pac. 706; Commonwealth *v.* Shortall, 55 Atl. 20.

[89] Crowell *v.* Crispin, 4 Daly, 100; Macbeth *v.* Haldimand, 1 Term Rep. 172.

[90] Crowell *v.* Crispin, 4 Daly, 100; Richardson *v.* Crandall, 47 Barb. 335.

(h) *Liability of Military Officers Under Writ of Habeas Corpus.*—Military officers are frequently made respondents in civil proceedings, by the service upon them of writs of habeas corpus sued out by or on behalf of enlisted men or military prisoners claiming to be discharged from the service or from military custody, on the ground of illegal enlistment or absence of jurisdiction over them on the part of military authorities. It was conclusively adjudged and settled in 1871 by the Supreme Court of the United States[91] that state courts have no power whatever to discharge such persons when duly held by the military authorities of the United States. Should any state or municipal tribunal issue the writ in such case, the officer in charge of the petitioner and upon whom service is made, is not, strictly, required to make any return or response to the same; yet, as a matter of comity, he will always do so to the extent of advising the court that he holds the petitioner by the authority of the United States, as an enlisted soldier, general prisoner or military convict, setting forth in brief and concise statement, the status of the petitioner. He will decline, however, in respectful terms, to produce the body of the petitioner before the court on the ground of its want of jurisdiction over the subject matter.[92] On the return day of the writ, he will present his return, whereupon the court should, as a matter of course, dismiss the proceedings. However, should the state court assume jurisdiction, and commit the officer for contempt, he will forthwith sue out a writ of habeas corpus for his own release in the United States Circuit or District Court. If the state authorities attempt to take the soldier from military custody, they should be prevented by the use of such military force as may be necessary for the purpose.

But when an officer of the army is served with a writ of habeas corpus issuing from a United States Court, he will immediately make full return to the same, setting forth all the facts of the case and the authority under which the petitioner is held and on the return day, will appear with the body of the petitioner before the court to abide by its order thereupon.[93]

Amenability to Criminal Prosecution in State Courts.—Except where the act was committed upon a reservation or territory within the exclusive jurisdiction of the United States, a military person is liable for a criminal offense against the local law and may be prosecuted in the courts of the state in the same manner as is a civilian. The fact that he is in the military service of the United States, affects in no degree, his amenability to such prosecution; nor is it

[91] Robb *v.* Connolly, 111 U. S. 632; Tarbell's Case, 13 Wall. U. S. 497.

[92] Paragraphs 1006 to 1008, U. S. Army Regulations; 13 Op. Atty. Gen. 451.

[93] See Forms of Return in Manual of Courts-Martial, 1901, pp. 168 to 170.

material that at the time of the offense, he was engaged in the performance of military duty, if in such performance, he was culpably negligent or exceeded his authority. It may be added, however, that prosecutions of officers or soldiers for crimes, in state courts, have not been of frequent occurrence.

Removal of a Case from a State to a United States Court.— Where a military person is prosecuted in a state court on account of an act performed in the line of his duty, he is entitled to have the case removed to a federal court. The proper course of procedure is to sue out a writ of habeas corpus in the United States court. Section 753 of the Revised Statutes of the United States is here applicable and reads as follows: "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States; or is committed for trial before some court thereof; or is in custody for an act done or committed in pursuance of a law of the United States or of an order, process, or decree of a court, or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States." It must be self-evident that the intention and effect of this statute is to withdraw the federal question, on which a petitioner under the act claims justification and exemption, away from the state courts for full and final determination by a federal judge and to discharge the petitioner from state custody when he has established by proof, to the satisfaction of the federal court, that he is entitled to his discharge; the theory of the law being that he is deemed to be innocent, that he has committed no crime, that he has done only what the supreme law of the land has required him to do. However, should he fail to establish his justification under federal authority, he will be remanded for trial to the state court before which the charge against him was made. This doctrine enunciated by MR. JUSTICE MILLER in the great case of *In re Neagle* [94] is applicable to military persons and embraces a thorough construction of the law of habeas corpus and the powers of the federal courts under both the Acts of Congress of 1833 and 1842 in relation thereto. The Act of March 3, 1875,[95] likewise interposes an obstacle to the prosecution of federal officers in the state courts in all controversies arising under the Constitution and laws of the United States, by providing for the transfer of cases, at the option of the defendant, to the circuit court embracing the district where the action is begun.

[94] 135 U. S. 1, 54; see also *Ex parte* Seebold, 100 U. S. 371, 394; Wells *v.* Nickles, 104 U. S. 444; *Ex parte* Jenkins, 2 Wall. Jr., 521, 529.

[95] 25 Stat. at Large, 433.

Defense and Indemnification of a Military Person Sued or Prosecuted.—Where an officer or soldier is subjected to a suit or prosecution on account of an act done in the performance of an official duty, he may apply to the Attorney General through the Secretary of War, to be defended at the expense of the government. If, because it is considered that the United States has not a sufficient interest in the controversy or for other reasons, his application is not acted upon favorably, he must then proceed to make proper provision for his own defense. If the result of the litigation be a judgment against him for damages, he may apply to Congress for an appropriation to cover the amount of the judgment and also for his reasonable expenses in defending the suit.[96] Congress has from time to time passed special acts for the relief of officers of the army or navy who have been subjected to pecuniary losses on account of suits for acts done in the honest discharge of their duty. It must be understood that such relief, whether it be expenses furnished in defense of a suit or an appropriation to cover judgment rendered, is granted at the discretion of the Attorney General or of Congress, as the case may be, and does not follow as a matter of right.

Amenability to Criminal Prosecution in Military Courts.

(a) *In Time of War.*—In time of war, insurrection or rebellion, persons in the military service of the United States, may be tried by general court-martial under the 58th Article of War, for the crimes against the laws of the land, specifically enumerated therein, such as murder, manslaughter, assault with intent to kill, burglary, robbery, larceny, arson, mayhem, etc. This jurisdiction is limited strictly to the confines of the war, insurrection or rebellion, and is also subject to the provision of the last clause of the 58th Article which reads, "and the punishment in any one case shall not be less than the punishment provided for the like offense by the laws of the state, territory or district in which such offense may have been committed."

It will be observed in general where the Articles of War do not prescribe a fixed penalty as punishment for an offense, that a wide discretion is left to the military court, which, under many of the Articles, may order such sentence to be executed as it deems proper. Indeed nearly all of the Articles relating to offenses against the military law conclude with the words "shall be punished as a court-martial may direct."

(b) *In Both Peace and War.*—Under paragraphs 9 and 11 of the

[96] Wilson *v.* MacKenzie, 7 Hill, N. Y. 95.

60th Article of War, larceny is made cognizable at all times by court-martial, where committed in respect to public property. With this one exception the crimes enumerated in the 58th Article cannot, in time of peace, be legally made the subject matter of trial by court-martial.[97] But in every instance where a military person violates a law of the land he is also guilty of the military offense of "conduct prejudicial to good order and military discipline," and in cases not capital, may be tried by court-martial under the 62nd Article.[98]

If the offense of an officer be of such enormity as to constitute "conduct unbecoming an officer and gentleman," it may be tried under the 61st Article of War. Articles 60, 61 and 62 are applicable at all times alike in peace and war.

CHARLES E. SMOYER.

OMAHA, NEBRASKA.

[97] In re Esmond, 5 Mackey (D. C.), 64; Swaim *v.* U. S. 28, Ct. Cl. 173.

[98] Winthrop's Military Law, p. 1124.